Supreme Court, U. S.
FILED
AUG 18 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.,
Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

Marilyn G. Rose, Esq.
Herbert Semmel, Esq.
Center for Law and
Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

Douglas Shachtman, Esq.
1823 Lancaster Avenue
Wilmington, Delaware 19805
(302) 655-1800

Attorneys for Petitioners

IN THE
SUPREME COURT OF THE UNTED STATES
OCTOBER TERM, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.,
Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

Petitioners reply to new points raised by the Federal Respondent in its opposition as follows:

The Federal Respondent claims that Petitioners did not raise below the contention that the Secretary's decision was not made "under the statute", therefore "it is not properly raised here" (Brief

for Federal Respondent, p. 7). That contention is incorrect. In their brief to the Court of Appeals for the Third Circuit, relevant excerpts reproduced in an appendix herewith (see pp. i-vi), petitioners clearly claimed that a decision reached as a result of the personnel and political influence of a powerful friend and advisor to the President was not a determination made under the statute (section 1122(f)) and therefore not within the preclusion of judicial review of that statute.

Respectfully submitted,

MARILYN G. ROSE, ESQ.
HERBERT SEMMEL, ESQ.
Center for Law and
Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

DOUGLAS SHACHTMAN, ESQ.
1823 Lancaster Avenue
Wilmington, Delaware 19805
(302) 655-1800

Attorneys for Petitioners

APPENDIX

RELEVANT EXCERPTS FROM BRIEF OF PETITIONER IN THE U.S. COURT OF APPEALS

...

[20]

V. ARGUMENT

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT IT WAS PRECLUDED FROM CONSIDERING THE STATUTORY AND REGULATORY CAUSES OF ACTION.

...

[22]

...

1. The Statutory and Regulatory Causes of Action Are Not Precluded by The Clear Command of The Statute.

In determining whether a particular claim is precluded by the language of the statute, federal courts, favoring reviewability, have given no broader interpretation to the literal language of a preclusion statute than it literally demands. Thus, in Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967), involving a statute utilizing preclusion language at least as broad as that

in §1122(f)13/, that Court held that a preclusion of judicial review of "a claim for benefits" did not preclude review of any subsequent discontinuance of benefits already

[23]

conferred. Later, the Supreme Court, in reviewing that statute, as amended by Congress to reverse Tracy v. Gleason, held that the successor preclusion provision did not reach constitutional challenges, as, albeit broader, it still did not reach constitutional challenges. Johnson v. Robinson, 415 U.S. 360 (1974). The Supreme Court said (at 367),

> "A decision of Law or fact "under" a state is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. Appellee's constitutional challenge is not to any such decision of the Administrator, but rather to a decision of Congress ..."

13/ 38 U.S.C. §211(a) (1958) provided: " ... the decisions of the Administrator on any question of law or fact concerning a claim for benefits of payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

The following year the Supreme Court, in Weinberger v. Salfi, 422 U.S. 749 (1975), drew a contrast between statutes precluding judicial review entirely, and those precluding review of an administrator's decisions under the statute. Citing its decision in Johnson v. Robinson, the Supreme Court said

> "We concluded that [38 U.S.C. §211(a) did not preclude] an attack on the constitutionality of a statutory limitation. We concluded that it did not, basically because such a limitation was not a "decision" of the Administrator "on any question of law or fact"; indeed, the "decision" had been made by Congress, not the Administrator, and the issue was one which the Administrator considered to be beyond his jurisdiction ..."
>
> "The language of §405(h) is quite different. Its reach is not limited to decisions of the Secretary on issues of law or fact. Rather, it extends to any "action" seeking to recover on any [Social Security] claim - irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory restrictions ..."

The distinction demonstrates the error of the District Court's decision in the instant case with respect to those causes

[24]

of action described above. Congress has not precluded all instances of judicial review under the §1122 program by the limitation set forth in §1122(f). Only actions, first, by the Secretary, and second, which constitute determinations by the Secretary under this section, are precluded from judicial review.

...

[25]

...

The second claim against HEW is also beyond the scope of the limitation of §1122(f). Allegations that government officials acted, not in an impartial administration of their duties, but as a result of the special influence of a powerful economic figure, a personal friend and advisor to the President, goes to the very heart of governmental legitimacy. Less than a month before the intervention of Shapiro, the Acting Administrator of HRA had taken the position that the changes necessitated by civil rights obligations

required an entirely new §1122 review (J.A. 90). Indeed, the Office for Civil Rights also indicated that the changes which it was then negotiating would require local and state health planning agency approval (J.A. 79). These changes involved unlimited commitments of funds and changes in services, including: an obligation to provide transportation (and obtain sufficient buses) to meet the unlimited demands of patients, their visitors, and employees; the obligation to renovate the Delaware Division, no matter what the cost; an open-

[26]

ended obligation to rearrange services to correct an over-occupancy problem at the Delaware Division and still not violate the racial identifiability standards which HEW and WMC established; architectural changes in both the planned facility and the Delaware Division to comport with §504. The District Court itself has noted that these commitments represent substantial, and unlimited, financial commitments (supra, pp. 15-16). They obviously involve additional capital expenditures and a change of service as those terms are used in the §1122 regulation (see 42 CFR

§100.103(a)(2)(v)). However, within days after Shapiro asked Califano to reconsider the September 7 decision that these changes required a new §1122 review, the September 7 decision was summarily reversed. Further, the final civil rights contract, without explanation, did not include the previously described necessary submittal to state and local health planning agencies (supra, p. 12). The preclusion of review provision in §1122(f) does not, on its face, reach the issues raised by this cause.

...